INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1277

IN THE MATTER OF THE APPLICATION TO DISCIPLINE JULES CHOPAK, AN ATTORNEY AND COUNSELOR AT LAW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 118–134) is reported at 66 F. Supp. 265. The opinions of the Circuit Court of Appeals for the Second Circuit (R. 137–143) have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on March 18, 1947 (R. 144). The petition for a writ of certiorari was filed on April 22, 1947. The jurisdiction of this Court is invoked under the provisions

of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in failing to set aside an order of the District Court of the United States for the Eastern District of New York, suspending an attorney for three years from practice before that court for certain oral and written statements made in connection with a suit pending there.

RULES INVOLVED

The pertinent portions of Rule 3 of the rules of the District Court and of paragraphs 1 and 3 of the Canons of Ethics of the New York State Bar Association, to which Rule 3 refers, are set forth in the Appendix to this Brief, *infra,* pp. 18–19.

STATEMENT

On April 3, 1946, on the basis of an affidavit by an Assistant United States Attorney (R. 35–36), the District Court for the Eastern District of New York issued an order directing petitioner to show cause why he "should not be dealt with in accordance with the law and rules and practices of this Court for unprofessional conduct and for conduct prejudicial to the administration of justice" (R. 34). The affidavit referred to certain letters and statements set out in a Bill of Particulars thereafter served on petitioner (R. 37–50), among which were the following:

(a) A letter dated June 9, 1945, from petitioner to one Cathey, a client in a case then pending in the District Court, which letter, referring to a proposed compromise and a conference with a judge of the Court, continued in part as follows (R. 38–39):

> * * * The Judge said that the case will not be reached for trial and cannot be tried this month and that therefore it will positively go over to Fall, to October. I do not know who the Judge will be in October; some judges I do not like. Maybe I won't want the October Judge. * * * DOCTOR STOOKEY'S LAST REPORT WAS SO DANGEROUS AND SO SHARPLY ANTAGONISTIC TO YOU, THAT IT ALONE COULD BE MADE GROUNDS FOR A JURY TO TURN US OUT WITHOUT A NICKEL. (That is, if they wanted to feel prejudiced FOR ANY REASON or to think, EVEN IF FALSE, that you were a FAKIR. There is no guarantee about juries. I think THEY STINK. * * *

(b) A letter dated September 28, 1945, from petitioner to the same client, for whom and at whose motion another attorney had just been substituted, reading, in part, as follows (R. 45):

> I forced your matter to a conference with Judge Kennedy when I was yet your lawyer. In it, he had the power, right and duty to mediate between the parties and the lawyers in your cause. To him, you were

just another name and another case. I brought Mr. Fay along, caused him to participate to break the resistance of prejudice.

When Judge Kennedy, the same judge who let you cast off your lawyer so lightly, because the law is silly in that regard, heard an offer of $2,500.00 was made and I was squawking for more, he veritably chased me right out of his office. He was as impatient with me for you as he was with me on both days that you were audience to his actions. If you thought that his actions were leveled at me personally you were greatly mistaken, because he simply dealt as is his custom according to his own tastes and judgment.

(c) A statement made by petitioner in explanation of the September 28 letter, in the course of a proceeding before a referee appointed to take testimony in connection with a controversy among petitioner, another attorney, and this erstwhile client as to the distribution of the verdict recovered by the client. The statement, in part, was as follows (R. 48–49):

Q. Did you tell Mr. Cathey in any conversations with him that Judge Kennedy, of this Court, was prejudiced against him because he was a Negro? A. No.

Q. Did you ever put that in writing? A. I don't know, I did not but I would like to see any letter or communication to which you refer.

Q. Well, I refer to the communication of September 28th, which is one of the exhibits here? * * *

* * * * * * *

* * * It starts off "I forced your matter to a conference with Judge Kennedy when I was yet your lawyer. In it, he had the power, right and duty to mediate between the parties and the lawyers in your cause. To him, you were just another name and another case. I brought Mr. Fay along, caused him to participate to break the resistance of prejudice."

Q. Prejudice of whom? A. Against me; I am a Jew, and I will add also that he was a colored man. I think that also is a prejudice.

The REFEREE. I think a reflection on any one in this Court is entirely unfounded and uncalled for, and that if there is the slightest insinuation along those lines by either the plaintiff or by you, Mr. Chopak, a public statement should be made by way of apology or a statement to the effect it was not intended to reflect on any of the Judges of this Court. That is my view.

Mr. CHOPAK. I agree with you, Judge, perhaps it is more heated than anything else and on sober reflection I would have deleted that paragraph in that letter.

(d) A letter dated March 25, 1946, from petitioner to Judge Clarence G. Galston of the District Court, in response to the notice of settlement

of an order which the judge had directed to be entered, confirming the report of the referee, fixing his fee, and providing for the distribution of the verdict, in part to petitioner in payment of the fee claimed by him. The letter reads as follows (R. 50):

JULES CHOPAK
Counselor at Law

MARCH 25, 1946.

Honorable CLARENCE G. GALSTON
Judge United States Court, Eastern District, of New York, Brooklyn, New York

Re: *Order Cathey* v. *Bethlehem Steel Co.* returnable for signature March 26, 1946

DEAR SIR: In the light of my past experiences before you, I think it is futile and a waste of stationery to submit a counter order to you for signature.

I think signing this order in its form in its entirety is despotic and in excess of authority as well as deliberately taking advantage of your office to rule with passion and vehemence.

If a specific proceeding was presented to you and you referred the specific proceeding for reference, regardless of justice of so doing, which, of course, is answered that it is correctible on appeal to the Appellate Court, why should your Referee and you deliberately go out of your way to decide a matter which was not embraced in the

proceeding and go beyond the issues just so as to show an example of authority.

I protest the signature of this order in this form.

If I had the slightest notion that a counter order would even be considered I would submit one.

No copy of this letter is sent to any other attorney or person as a proposed counter order need not be served.

Respectfully,

Jules Chopak.
JULES CHOPAK.

On March 27, 1946, Judge Galston referred this last letter to the senior judge of the District Court and requested that disciplinary proceedings be instituted against petitioner (R. 33). The order to show cause (R. 34) and the Bill of Particulars (R. 37–50) followed. In response to the order, petitioner sent a letter dated April 29, 1946, to the senior judge, reading in part as follows (R. 51):

> As I make no issue as to the genuineness of the basis of the papers which comprise the charges, and, upon a hearing, I could only repeat what has been stated in the accompanying papers. I beg to be excused from personally appearing before your august body just to repeat the same matter all over again in another form and at the expense of a stenographer's record.
>
> * * * * *

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> Therefore, I respectfully request the Court to waive any oral hearing and personal presentation.

Accompanying the letter was his affidavit, admitting that he had written the letters and made the statement referred to in the Bill of Particulars, but urging in defense and for mitigation, that Judge Galston had not complied with the ethical standards for judicial office; that lawyers had a right, protected by the Constitution, to criticize judges; and that petitioner's conduct was not in violation of his obligations as lawyer (R. 52–67). An affidavit of another attorney criticizing Judge Galston's conduct in the matter here involved (R. 68–70), letters from various bar associations of a general and indefinite purport (R. 71–74), and a memorandum of law (R. 75–77) were also filed by petitioner.

On May 1, 1946, a hearing on the order to show cause was held before four of the district judges (R. 83–105).[1] Petitioner did not appear personally, and his attorney consented to the submission of the matter on the papers but promised that petitioner would appear if the court desired that he do so (R. 83–84, 90–91, 104–105). Nevertheless, when by order dated May 22, 1946, the court ordered petitioner to appear personally before them on June 3, 1946, he failed to do so (R.

[1] Neither of the judges referred to in petitioner's letters and statement took part in the disciplinary proceeding.

106–107). Instead, on May 29, petitioner had addressed a letter to the senior judge, asking that the hearing not be held, advising that he did not expect to appear, and admitting again that he had written the letters and made the statements with which he was charged, but denying their impropriety (R. 109). Again, on May 31, 1946, petitioner sent still another letter, this to all the judges sitting in the proceeding, noting his intention not to appear, stating that he had voluntarily withdrawn from matters pending in the District Court and intended to accept no new matters requiring practice in that court, and praying that this "voluntary penalty" which he had imposed on himself be permitted to end the matter (R. 111–113). When inquiry was made, however, petitioner's representative insisted that petitioner had not intended that letter as a resignation from the court's roll of attorneys (R. 113–115, 116).

Thereupon, the District Court, after a consideration of all the proceedings and the documents on file, found that "The record as a whole demonstrates a complete lack of understanding, on the part of * * * [petitioner], of his obligations as a member of the Bar of this Court toward the institution in which he conducts a client's cause" (R. 131), and that he had been guilty of unprofessional conduct and had offended against the Canons of Ethics of the New York State Bar Association, both in violation of Rule 3 of the court (R. 133); and, on these findings and tak-

ing into consideration the fact that petitioner had been previously twice disciplined, once by the same court and once by the Court of Customs and Patent Appeals (R. 133), the court issued the order of suspension (R. 30–32). On appeal, the Circuit Court of Appeals for the Second Circuit, with Judge Clark dissenting,[2] affirmed the order of the District Court (R. 137–144).

ARGUMENT

The court below, finding that petitioner's conduct had "passed all bounds of propriety" and clearly "required disciplinary action," held that the measure of discipline was a matter for the sound discretion of the District Court and that that discretion had here been exercised without abuse; consequently, it affirmed the order of suspension (R. 137–140). We submit that there was reasonable warrant for the decision and that no review by this Court is necessary.

That courts have the inherent power to suspend or disbar attorneys admitted to practice before them cannot now be questioned. The exercise of that power by the Federal judiciary has been repeatedly upheld by this Court. *Ex parte Secombe,* 19 How. 9; *Ex parte Burr,* 9 Wheat. 529; *Ex parte Wall,* 107 U. S. 265; see *Bradley* v.

[2] Judge Clark's dissent was not on the ground that petitioner's conduct was not improper and unprofessional, but rather that the three-year suspension was too severe a disciplinary measure (R. 142). He therefore urged return of the proceeding to the District Court for reconsideration (R. 143).

Fisher, 13 Wall. 335; *Ex parte Bradley*, 7 Wall. 364, 374; *Ex parte Garland*, 4 Wall. 333, 378–379. Equally well established is the broad discretion in the *nisi prius* court to determine (a) whether the conduct involved calls for disciplinary action, and (b) the extent of the discipline to be imposed. The reviewing court is confined solely to the function of ascertaining whether there was an abuse of that discretion or an irregularity in its exercise. *Ex parte Secombe, supra; Ex parte Burr, supra; In re Claiborne*, 119 F. (2d) 647 (C. C. A. 1); *In re Spicer*, 126 F. (2d) 288 (C. C. A. 6).[3]

The courts below regarded petitioner as derelict in his failure to maintain that respect which attorneys owe to the courts of justice and to judicial officers. To criticize a court's ruling, whether before the court itself or on appeal, as erroneous in law and unsupported by fact is one thing; such criticism would be not only proper but might well

[3] *Ex parte Burr*, 9 Wheat. 529, 530, per Marshall, C. J.: "* * * it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case. * * * the [Supreme] court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper."

be required in performance of the lawyer's obligations to his client. But it is quite another to brand a judge's official act "despotic," as did petitioner here, to accuse him of "deliberately taking advantage" of his office "to rule with passion and vehemence", and of such unfairness and partiality as to make it "futile and a waste of stationery" for petitioner to submit a counter order to him for settlement (R. 50), and unjustifiably to impute racial and religious prejudice to another judge (R. 45, 48–49). Such comments resemble the "insulting language and offensive conduct toward the judges personally for their judicial acts" which this Court censured in *Bradley* v. *Fisher*, 13 Wall. 335, 355. Cf. *Cooke* v. *United States*, 267 U. S. 517.

These statements of petitioner were both written and oral. When they are coupled with petitioner's failure, notwithstanding numerous opportunities, to apologize for the letter to Judge Galston (R. 50) and his refusal to comply with the District Court's order that he appear before it personally to explain his conduct (R. 106–107, 109, 111–113), there can be little doubt as to the correctness of the refusal of the court below to set aside the order of suspension.

The integrity of the judiciary is vital to the fair administration of justice and, thus, to the preservation of our democracy. See *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*,

328 U. S. 331. Since lawyers are officers of the courts (*Powell* v. *Alabama*, 287 U. S. 45, 73) and consequently more likely by their unwarranted and unfavorable aspersions against the judiciary to damage its reputation in the eyes of the citizenry, the courts have been vigilant to discover such misconduct and to discipline the guilty. Disciplinary proceedings of this character are not uncommon. *Duke* v. *Committee on Grievances, etc.*, 82 F. (2d) 890 (App. D. C.), certiorari denied, 298 U. S. 662; *In re Claiborne*, 119 F. (2d) 647 (C. C. A. 1); *Ex parte Cole*, 1 McCrary 405, Fed. Cas. No. 2973 (C. C. D. Iowa, per Miller, J.); *United States ex rel. Hallett* v. *Green*, 85 Fed. 857 (C. C. D. Colo.); and see *Kelley* v. *Boettcher*, 82 Fed. 794 (C. C. A. 8, per Brewer, J.); *Cooke* v. *United States*, 267 U. S. 517; *In re Minnis*, 56 Sup. Ct. 504.[4]

In the *Duke* case, *supra*, Duke, an attorney for one of the defendants in a criminal prosecution (*Moder* v. *United States*), used the following language to complain of the action of the trial justice in signing a bill of exceptions submitted by counsel for the prosecution and in refusing to

[4] Typical of proceedings in the state courts are: *In the Matter of Pryor*, 18 Kan. 72, 26 Am. Rep. 747 (per Brewer, J.); *State Board of Law Examiners* v. *Hart*, 104 Minn. 88, 116 N. W. 212; *In re Glauberman*, 107 N. J. Eq. 384, 152 Atl. 650; *Matter of Rockmore*, 127 App. Div. 499, 111 N. Y. Supp. 879; *In re Eaton*, 60 N. D. 580, 235 N. W. 587; *Wilhelm's Case*, 269 Pa. 416, 112 Atl. 560; *Snyder's Case*, 301 Pa. 276, 152 Atl. 33; *In re Troy*, 43 R. I. 279, 111 Atl. 723.

admit the defendants to bail (82 F. 2d, at 891, 892):

> Appellants * * * charge that the * * * trial justice has intentionally and deliberately sent up * * * a false, inaccurate, incomplete, deleted and diluted, bill of exceptions * * *, and the United States Attorney stands equally guilty in this obstruction of justice, and falsification of records herein.
>
> * * * * *
>
> * * * the trial judge has destroyed any possible belief in either his judicial discretion or his judicial or personal integrity because of his falsification of the record in this case. * * *

Confronted with such accusations, the Court of Appeals for the District of Columbia ordered a preliminary hearing on the question whether the record on appeal was in fact a deliberate and premeditated perversion of the facts of the trial *Moder* v. *United States*, 62 F. (2d) 462 (App. D. C.). Duke, however, declined to submit a statement of facts which the court invited and failed to appear at the hearing. The judgment of the District Court was thereupon affirmed. Thereafter, Duke, acting as counsel for plaintiff in another suit, caused that client to verify and file an affidavit of disqualification against the justice whose conduct Duke had attacked in the previous suit, the affidavit reiterating the charges previously made (82 F. 2d, at 892–893). In defense of the disbarment pro-

ceeding which then followed, Duke repeated his charges (82 F. 2d, at 893). The Supreme Court of the District of Columbia entered an order of disbarment; the Court of Appeals affirmed; and this Court denied certiorari, 298 U. S. 662.

We submit that review of the lower court's decision here should likewise be denied. There was evidentiary support for the finding as to petitioner's unprofessional conduct. And there is no question but that the proceedings against him were regular in every respect, adequate notice and opportunity to be heard having been accorded him at every stage.[5] The fact that the District Court noted that petitioner had been twice disciplined on prior occasions for unethical conduct (*In re Chopak,* 43 F. Supp. 106 (E. D. N. Y.); *In re Chopak,* 20 C. C. P. A. 124) infringed none of his rights. It was a proper element to be considered in measuring the extent of the discipline to be meted out.

Nor is there any constitutional infirmity in the District Court's order, as petitioner apparently

[5] "It is not necessary that proceedings against attorneys for malpractice, or any other unprofessional conduct, should be founded upon formal allegations against them. * * * All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judge, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." *Randall* v. *Brigham,* 7 Wall. 523, 540; *In re Claiborne,* 119 F. (2d) 647 (C. C. A. 1).

suggests (Pet. 2). As this Court noted many years ago, in upholding the judicial power to disbar attorneys, in *Ex parte Wall,* 107 U. S. 265, 288:

> * * * the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws. The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision.

This is not a contempt proceeding such as those involved in *Bridges* v. *California,* 314 U. S. 252, and *Pennekamp* v. *Florida,* 328 U. S. 331. By suspending petitioner, who has disregarded his obligations as an officer of the court (*Powell* v. *Alabama,* 287 U. S. 45), from practice before it, the District Court is seeking primarily to preserve "the courts of justice from the official ministration of persons unfit to practise in them." *Ex parte Wall., supra,* at 288; *State* v. *Peck,* 88 Conn. 447, 91 Atl. 274. The lawyer, an officer of the courts in which he practices, is the guardian of a public trust. *Randall* v. *Brigham,* 7 Wall. 523, 540; *Booth* v. *Fletcher,* 101 F. (2d) 676, 680 (App. D. C.), certiorari denied, 307 U. S. 628. The right to regulate the legal profession and to remove from its lists those found disqualified and unfit for the adequate performance of that trust is essential to the protection of the public interest. *Booth* v.

Fletcher, supra. As Mr. Justice Brewer said, in speaking of our courts, in *Hatfield* v. *King,* 184 U. S. 162, 168: "It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach be kept clean."

That the exercise of the courts' power to discipline the bar may, to some degree, limit the lawyer's freedom of expression is cogent argument for caution in its exercise, but it is hardly reason to deny the power. Certainly the lawyer's license to insult and calumniate the judiciary must give way to the public interest in maintaining the integrity of the courts and the faith of the people in a fair administration of justice. See *Duke* v. *Committee on Grievances, etc.,* 82 F. (2d) 890, certiorari denied, 298 U. S. 662 and other cases cited, *supra,* p. 13 and fn. 4.

CONCLUSION

The decision of the court below raises no questions warranting further review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
PEYTON FORD,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
HARRY I. RAND,
Attorneys.

MAY 1947.

APPENDIX

A. Rules of the United States District Court for the Eastern District of New York (1938):

Rule 3. Disbarment.

* * * * *

Any member of this Bar may be disbarred, suspended from practice for a definite time, or reprimanded for good and sufficient cause shown, after an opportunity has been afforded such member of the Bar to be heard.

Unprofessional conduct on the part of a member of this Bar requiring discipline, shall include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or a failure to abide by any of the provisions of the Canons of Ethics of the New York State Bar Association.

* * * * *

All applications for orders to show cause why a member of the Bar of this Court should not be disciplined shall be made to or before the Senior Judge of this Court unless otherwise ordered by him, or he shall be absent from the District, in which last mentioned contingency they shall be made to or before the Senior of the Judges within this District.

B. Canons of Ethics adopted by the New York State Bar Association (1909):[1]

[1] New York State Bar Association, Proceedings of the Thirty-Second Annual Meeting Held at Buffalo January 19, 28-29, 1909, etc., pp. 679 *et seq.*

1. *The Duty of the Lawyer to the Courts.*—It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit the grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

* * * * *

3. *Attempts to Exert Personal Influence on the Court.*—Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

* * * * *

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